merely helping to evict occupiers whom he had himself brought on to the land in breach of the conditions of his occupation and whom he could only evict by pretending to be evicted himself.

It was furthermore contended that there was a promissory estoppel operating against the defendant.

Mr. Jeyaretnam relied on the principle formulated by Denning J., as he then was, in *Central London Property Trust Ltd.* v. *High Trees House Ltd.*[3] where he held that the plaintiff company had made a promise that was "intended to create legal relations, was to the knowledge of the promisor, to be acted upon by the promisee, and was in fact so acted upon by the promisee", and that the plaintiff company was accordingly bound to honour its promise.

Applying this principle to the facts in the present case it seems to me that unless there was a promise by the defendant this principle cannot help the plaintiff at all. I have already held that there was no such promise. Assuming, however, that there was a promise by the defendant that it would grant a permit on compliance with the conditions to which reference has already been made and assuming that the plaintiff acted upon this promise and duly complied with the conditions imposed, I am of the opinion that the plaintiff cannot succeed. As *Spencer Bower and Turner* state in their 2nd Edition of the Law Relating to Estoppel by Representation at page 339, there are limitations or modifications which should be imposed upon the doctrine enunciated by Denning J. in the *High Trees'* case, *supra*. Six such limitations or modifications are examined in detail in this work and I need only refer to two such limitations or modifications.

First, the authors consider whether the doctrine can be used to support a claim or whether its application is limited to matters of defence. They reach the conclusion that the doctrine may afford a defence against the enforcement or otherwise of enforceable rights: it cannot create a cause of action.

Asquith L.J. in *Combe* v. *Combe* [4] said —

"What that case decides (meaning the *High Trees'* case) is that when a promise is given which (1) is intended to create legal relations, (2) is intended to be acted upon by the promisee, and (3) is in fact so acted upon, the promisor cannot bring an action against the promisee which involves the repudiation of his promise or is inconsistent with it. It does not, as I read it, decide that a promisee can sue on the promise. On the contrary, Denning J., expressly stated the contrary."

Next, the authors discuss a further proposition, to wit, that he who raises an equitable estoppel must do equity himself: otherwise equity will not assist him. In the present case it has taken 5 years at least for the plaintiff (and probably only after a writ of possession had been taken out to evict him) to make an attempt to comply with one of the essential conditions *viz.* that he should reduce the area of his residential occupation to 1,830 square feet. In other words, if there was a promise to give him a permit that promise was in turn dependent on the performance of another mutual promise in respect of which the promisee has not performed his part of the undertaking within a reasonable time or conducted himself in such a manner as to require the assistance of equity.

It would seem, therefore, that, on any view of the case, the plaintiff cannot succeed.

The plaintiff's claim is accordingly dismissed with costs.

Claim dismissed.

Solicitors: *Donaldson & Burkinshaw; J. Y. P. Chia & Co.*

WONG SIENG PING v. PUBLIC PROSECUTOR

[A.Cr.J. (Lee Hun Hoe J.) August 9, 1966]

[Sibu — Criminal Appeal No. 6 of 1966]

Criminal Law and Procedure — Trial — Evidence — Burden of proof — Whether burden shifts in a criminal trial.

This was an appeal against the conviction of the appellant for the offence of cheating. On appeal it was argued *inter alia* that the learned magistrate had erred in law concerning the burden of proof and the quantum or degree of proof. In his judgment the learned magistrate said: "An irregularity may be explained with plausibility but too many irregularities require convincing explanations. The burden of proof has shifted on him and he chose to discharge it by producing a document that clearly shows on it that it had been tampered with well in advance so as to falsify what was originally a genuine receipt. I am satisfied beyond reasonable doubt that the accused failed to establish a case which at least would raise doubt as to his guilt and entitle him to an acquittal". Later in his judgment he said "still it may be said that the prosecution here has not proved the case beyond reasonable doubt or in another language by preponderance of evidence".

Held: (1) the onus of proof of guilt always rests on the prosecution and never shifts to the accused. The onus never shifts to the accused to "give an explanation" or "to establish a case" as this would be inconsistent with the presumption of innocence;

(2) the burden on the prosecution in a criminal case is to prove the case beyond reasonable doubt and not on the preponderance of evidence only;

(3) in this case the magistrate had erred in law and therefore the appeal must be allowed.

Case referred to:—

(1) *Woolmington* v. *Director of Public Prosecutions* [1939] A.C. 462.

CRIMINAL APPEAL.

J. V. Nayar for the appellant.

C. J. Millar (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe J.: The appellant, a dentist, was charged and convicted by the learned magistrate sitting in the district court, Sibu of the offence of cheating under section 417 of the Penal Code.

Melina anak Nyalong testified that he wanted to buy a car and that he met the appellant who told him that he (appellant) knew Singapore well and could get a second-hand car which was as good as new for cash payment of $6,000. He said he got the money from Gelang, his mother-in-law and handed it to the appellant in the presence of several Ibans who also gave evidence. Appellant promised to get the car in two months. After two months Melina did not get the car so he reported to the police. The appellant denied strenuously that he had obtained $6,000 from Melina in order to buy a second-hand car from Singapore for him. His story is that Gelang came to his clinic to have 12 gold teeth, made, 6 upper teeth and 6 lower teeth. He charged her $120. Gelang paid a deposit of $60.00 and a receipt was given. Some months later Gelang and Melina came to ask appellant for the return of the deposit as Gelang wanted to go elsewhere to have her gold teeth made. The appellant refused to return the deposit saying that the receipt made it quite clear that the deposit would be forfeited after a certain period. An argument ensued. At the time there was present a person who was there for dental treatment and he acted as interpreter and he corroborated the appellant that Gelang and Melina were asking for the return of the deposit of $60. The prosecution witnesses mostly Ibans gave evidence that they saw the money being handed over to the appellant. Although they gave conflicting evidence on various matters, the learned magistrate in a lengthy judgment considered that these witnesses as a whole gave consistent evidence on fundamental facts essential to prove the case against the appellant. He thus convicted the appellant and sentenced him to four months' imprisonment.

The appellant appealed against his conviction on nine grounds which may be grouped under two headings. The first, which comprises seven grounds, relates to question of facts. While the second, which comprises the two remaining grounds, relates to question of law.

In the light of the view that I take I need only to deal with the second heading. The appellant contended that the learned magistrate erred in law in two aspects concerning the burden of proof and the quantum or degree of proof. He referred to page 28 of the record where in his judgment the learned magistrate stated:

"An irregularity may be explained with plausibility but too many irregularities require convincing explanations. The burden of proof has shifted on him and he chose to discharge it by producing a document that clearly shows on it that it had been tampered with well in advance so as to falsify what was originally a genuine receipt. I am satisfied beyond reasonable doubt that accused failed to establish a case which at least would raise doubt as to his guilt and entitle him to an acquittal."

The appellant contended that the learned magistrate was wrong to say that the burden of proof had shifted to the appellant. He submitted that, subject to the defence of insanity and in offences where onus of proof is specially dealt with by statute, the burden of proof never shifts to an accused person, in this case the appellant. There should be no ambiguity where the liberty of the subject is involved.

The learned deputy public prosecutor conceded that it would be fatal if it was a summing-up to a jury but argued that it is not necessarily fatal where it is not a jury trial. He said that unless it is shown that the learned magistrate misunderstood what was written the conviction should not be disturbed. He pointed out that the learned magistrate stated the law accurately at page 26 of the record in these words:—

"It is well established even before the case of *Woolmington* v. *Director of Public Prosecutions* (1) that while the prosecution must prove the guilt of prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt. It is also well established law that when the prosecution has discharged the burden of proof then the accused is under an obligation to explain the circumstances appearing against him. The burden of adducing evidence shifts on to him."

The learned deputy public prosecutor contended that the learned magistrate meant the tactical onus in the sense that if the appellant went into the box and gave evidence then the burden was shifted on to the appellant to give explanation.

It is confusing to speak of the shifting of burden of proof. This would give rise to the question what do the words 'burden of proof' as used by the learned magistrate mean. *Woodroffe & Ameer Ali's* Law of Evidence 8th Edition, page 678 states:

"The phrase 'burden of proof' has two distinct meanings namely the burden of establishing a case and the burden of introducing evidence. The burden of establishing a case remains throughout the entire case, where the pleadings originally place it. It never shifts. The party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue has this burden of proof. It is on him at the beginning of the case; it continues on him throughout the case; and when the evidence, by whomsoever introduced, is all in, if he has not, by the preponderance of evidence required by law, established his position or claim, the decision of the tribunal must be adverse to such pleader. On the other hand, the burden of proof, in the sense of burden of evidence, may shift constantly as evidence is introduced by one side or the other, — as one scale or the other preponderates over its fellow. To carry out the same metaphor; so often and so long as the scale containing an adverse amount of evidence preponderates to a certain extent the duty of necessity rests on a party to introduce opposing evidence which shall restore the

equipoise, or, if possible, strike a new balance."

That the onus of proof of guilt never shifts to the accused is clear and I quote again from *Woodroffe & Ameer Ali* at page 691:

"The onus of proving everything essential to the establishment of the charge against the accused lies upon the prosecution who must prove the charge substantially as laid. The onus never changes."

This matter is set with greater clarity in *Popple's* Canadian Criminal Evidence as appears from the following extract from pages 416 and 417:

"In a criminal case it is always the duty of the prosecution to prove the guilt of the accused 'beyond reasonable doubt'. But the expression 'burden of proof' has two aspects — (a) that of 'establishing a case' (a matter of 'law'); (b) that of 'introducing evidence' (a matter of 'procedure'). The onus of 'establishing a case' against the accused rests upon the Crown throughout the trial. It must prove every 'essential ingredient' of the crime. But the burden of 'introducing evidence' will be satisfied by the production of evidence which, if unanswered and believed, raises a 'prima facie' case upon which the jury might be justified in finding a verdict. And where the Crown has established such facts as without more will justify the jury in finding the accused 'guilty', he is not entitled to an 'acquittal' unless he does satisfy the burden which is then cast upon him of introducing evidence, but the extent of that burden is not to prove his innocence or honesty but merely to raise a 'reasonable doubt' in the minds of the jury as to his guilt. And where an onus is placed upon him by statute to establish his innocence or some other fact, the extent of that onus is only to satisfy the jury of the 'probability' of that which he is called upon to establish, for he is not required to prove any fact 'beyond reasonable doubt'."

Monir's Principles and Digest of the Law of Evidence, 4th Edition, Volume II, page 605 dealing with the matter under the heading of Onus in Criminal Cases states:—

"A criminal case is a 'proceeding' within the meaning of section 102 (similar to section 104 of the Sarawak Evidence Ordinance) and the burden of proof in such proceeding lies on the prosecution. The elementary principle of criminal law, that in all cases the burden of proof lies upon the prosecution to bring the guilt home to the accused, does not admit of any exception. Generally in criminal cases, unless otherwise directed by Statute, the presumption of innocence casts on the prosecutor the burden of proving every ingredient of the offence, even though negative averments be involved therein; and the difficulty of proving the necessary ingredients of the offence is no ground for exempting the prosecutor from that duty. The accused is entitled to keep mum casting the entire burden on the prosecution to prove his guilt, and by legally admissible mode of proof. In criminal cases the onus of proving the general issue never shifts, and it lies upon the prosecution to prove, by relevant evidence and beyond reasonable doubt, the guilt of the accused. It is not right for a criminal court to convict an accused person because the defence theory appears to it to be unreasonable or does not appear to it to have been established. Silence of the accused cannot be substituted for proof by prosecution. An accused person must always be presumed to be innocent until he has been found to be guilty. The burden of establishing any special issue raised by the accused rests upon him, but there is always the burden of the general issue as to the guilt of the accused person, which always rests upon the prosecution and never changed."

It is clear that the onus of proof of guilt always rests upon the prosecution and never shifts to the accused under section 104 of the Evidence Ordinance. This onus never shifts to the accused "to give an explanation" or "to establish a case" as it would be inconsistent with the presumption of innocence.

The appellant referred to another passage of the judgment of the learned magistrate at page 26 of the record which reads:

"Unless there are circumstances from which deliberate perjury can be inferred or demolition of the prosecution witnesses to a significant degree by cross-examination was successful. I cannot see why it cannot be said here the case for the prosecution had not in fact been established".

The learned deputy public prosecutor agreed that there was a slip in the use of English because of the triple negatives. This gives a meaning contrary to what was intended. I think that must be so in view of the preceding sentence. I believe there should not be a fullstop after the word "successful".

What has caused me some concern is the statement made by the learned magistrate at page 26 of the record immediately after the passage referred to previously by the learned deputy public prosecutor:

"Still it may be said that the prosecution here has not proved the case beyond reasonable doubt or in another language, by preponderance of evidence".

The appellant was right to contend that the quantum or degree of proof in a criminal case is high and if the prosecution fails to prove the guilt of the accused beyond reasonable doubt then the accused is entitled to an acquittal. The learned deputy public prosecutor submitted that the learned magistrate was probably referring to the stage when he ruled that there was a *prima facie* case to answer. I am unable to agree with the ingenious argument of the learned deputy public prosecutor. Although I appreciate the careful nature of the judgment I must point that it was not an extempore judgment but written after an adjournment of several days. The learned magistrate's choice of words may be unfortunate but the meaning is clear. This affects the quantum or degree of proof in a criminal case. If the prosecution did not prove the guilt of the accused beyond reasonable doubt then the conviction cannot be upheld.

In my opinion the appellant succeeds in this appeal on the second heading relating to the question of law. The conviction cannot be allowed to stand. I do not think it is necessary for me to go into the other grounds. The appeal is allowed and the conviction quashed.

Appeal allowed.